UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUEBLO OF SANDIA,	§	
	§	
Plaintiff	§	
	§	
v.	§	CIV. NO. 1:94CV02624HHG
	§	
BRUCE H. BABBITT, ET AL.,	§	
	§	
Defendants.	§	

INTERVENOR-DEFENDANT BERNALILLO COUNTY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF COUNTY'S CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenor-defendant Bernalillo County, New Mexico (the "County") herewith states its Opposition to the Motion for Summary Judgment of Plaintiff Pueblo of Sandia (filed June 26, 1996)("Pueblo") and joins in with and adopts the United States' Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment (filed June 27, 1997)("United States' Cross-Motion"). Further, Defendant County moves the Court to grant it summary judgment on the same grounds on which it opposes Plaintiff's Summary Judgment Motion.[1/]

[1/] In response to the record review proceeding convened by the Court in this matter (Opinion Dec. 10, 1996), Defendant Bernalillo County specifically adopts and joins the United States' contention in its Cross-Motion that the administrative record demonstrates that Secretary Hodel's decision not to grant the Pueblo's claim was fully supported by the record and was neither arbitrary nor capricious, and that Secretary Babbit's inaction on the Pueblo's claim does not constitute reviewable final agency action and/or was not arbitrary and capricious. As discussed in greater detail in Defendant County's Cross-Motion for Summary Judgment filed herewith, the extra-record materials referenced in the instant opposition and cross-motion are submitted in the first instance as post-hoc confirmation of the basis for Secretary Hodel's decision and should be considered as background confirmation of his actions at issue. In the alternative, these extra-record materials are submitted in response to the extra-record materials relied on by the Pueblo in its summary judgment filings, to the extent such reliance is accepted for consideration by the Court; in that case, the facts cited herein entitle Defendant to summary judgment on the claims originally asserted by Plaintiff in its Amended Complaint.

PROCEDURAL HISTORY

Intervenors adopt the summation of procedural history set out in the United States' Opposition and note in addition that the Court granted Intervenors' respective motions to intervene in this case by order dated February 21, 1997.

STANDARD FOR GRANT OF SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-24.

Further, while the court must view the record and draw all reasonable inferences from the evidence in favor of the non-moving party, where a fact is in dispute, the non-moving party must show that the fact is *material*, and that the dispute is *genuine*. *Kalekiristos v. CTF Hotel Mgmt. Corp.*, 958 F. Supp. 641 (D.D.C. 1987). No genuine issue of material fact exists "where the record as a whole would not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex*, 477 U.S. at 322-24. "If evidence is merely 'colorable' or 'not significantly probative' summary judgment may be granted." *MacPherson v. Searle & Co*, 775 F.Supp. 417 (D.D.C. 1991). More specifically, the mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable the trier of fact to reasonably find for the non-moving party. *Witco Corp. v. Beekhuis*, 38 F.3d 682, 686 (3d Cir. 1994).

Thus, once the movant has produced evidence in support of summary judgment, the non-moving party cannot rest on mere allegations or denials, or on conjecture, speculation, or suspicions. *See e.g., Winn v. United Press Int'l*, 938 F. Supp. 39, 45 (D.D.C. 1996), *aff'd*, 1997 WL 404959 (D.C. Cir. 1997); *CBS, Inc. v. Henkin*, 803 F. Supp. 1426, 1430 (N.D. Ind. 1992) (citing cases). Notably, the non-moving party must come forward with more than a mere scintilla of evidence in support of its position, *Anderson*, 477 U.S. at 249, and must establish that there is more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 574.

INTRODUCTION

In 1858, Congress, implementing the Treaty of Guadalupe-Hidalgo, confirmed the 1748 Spanish grant of land to the Pueblo that is the focus of this action. While the Pueblo claims that the 1748 grant entitles it to additional land (the "Claim Area"), significant new research (outside the administrative record) establishes that the Pueblo has already received more than the land provided by the 1748 grant. This new research confirms that Solicitor Tarr's conclusion rejecting the Pueblo's claim was fully justified. The grant conveyed a "formal pueblo," adjusted for certain topographical barriers, and the directional indication in the grant ("and on the east, the sierra madre called Sandia") did not signify the crest of Sandia Mountain as a border of the grant area as contended by Plaintiff.

The following shows how the Affidavit of Stanley M. Hordes, Exhibit F to Federal Defendants' Statement of Genuine Issues . . . (copy attached as Exhibit 3 to this Memorandum) (hereinafter "Hordes Affidavit") and Dr. Hordes' Report, *History of the Boundaries of the Pueblo of Sandia, 1748-1860* (March 1, 1996) ("Hordes Report," Exhibit 1 hereto) authoritatively confirm the basis of the conclusions of Solicitor Tarr and Secretary Hodel's adoption thereof. The following also distinguishes the present case from the decision in *Pueblo of Taos* on grounds of the concrete

private interests threatened by the Plaintiff's claim for relief in this case. Further, to the extent that Plaintiff's Opposition to Federal Defendant's Cross-Motion effectively ignores the record-review nature of this proceeding and relies heavily on extra-record materials in an argument of the purported merits, these authorities refute Plaintiff's merits arguments.

DISCUSSION

A. The 1748 Land Grant Contemplates a Formal Pueblo and Does Not Support Plaintiff's Claim

1. The Intent of the Legislature is Controlling

As a threshold matter, it is well established that in the construction of statutes, the legislative will is the controlling factor. *E.g., United States v. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1941) ("The question ... in any problem of statutory construction, is the intention of the enacting body"); *United States v. Bornstein*, 423 U.S. 303 (1976) (duty of the courts is to give faithful meaning to the language Congress adopted in light of legislative purpose in enacting statute); *Norfolk Redevelopment & Housing Auth. v. C&P Telephone Co.*, 464 U.S. 30, 35 (1983). By way of comparison, where legislation affecting the boundaries of Indian reservations is at issue --that is, legislation clearly implicating the government's fiduciary responsibility toward the Indians-- ambiguities are to be resolved in favor of the Indians. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). However, even in such case, the "'face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." *Id.* at 587 (citation omitted).

With regard to the focus of this case, namely the 1748 grant of a formal pueblo by the Spanish government to the Pueblo of Sandia, Congress provided in 1854 that to effectuate the 1848 Treaty of Guadalupe Hidalgo, the Surveyor General, under supervision of the Secretary of the

Interior, would "ascertain the origin, nature, character, and extent of all claims to lands under the laws ... of Spain and Mexico. Act to Establish the Offices of Surveyor-General..., § 8, 33 Cong., 1st Sess. (July 22, 1854). Thereupon, Congress would confirm *bona fide* grants and give full effect to the Treaty. *Id.*

Further, in 1858, Congress passed a law to confirm the land claims of various pueblos. It provided that "the Pueblo land claims in the Territory of New Mexico designated in the corrected lists as-- ... Pueblo of Sandia in the county of Bernalillo ... be, and they are hereby, confirmed." 11 Stat. 374 (Dec. 22, 1958). The intent of this statute, known as "An Act to confirm the Land Claims of certain Pueblos and Towns in the Territory of New Mexico," on its face was confirmation of *bona fide* land grants recognized pursuant to the Treaty of Guadalupe-Hidalgo.

Plaintiff has accordingly acknowledged that its claim derives from and depends on the terms of the underlying 1748 Spanish grant. *E.g.*, Plaintiff's Memorandum in Support of Summary Judgment at 3-4 (July 7, 1996) ("The 1748 royal grant, by its express terms, includes all the claim area.... The Treaty of Guadalupe-Hidalgo ratified all land titles which had been made by the Spanish sovereigns"); letter of P. Grossi to F. Ryan (Mar. 14, 1986) (Admin. Rec. # 188). However, the Hordes research, fully confirming Solicitor Tarr's conclusions, shows in fact that the 1748 grant does not support the Pueblo's claim.

2. The 1748 Land Grant Conveyed a "Formal Pueblo"

The Decree granting lands to the Pueblo of Sandia clearly evidences the intention that the new entity be considered as a "pueblo formal de indios," consistent with the practice of the Spanish

Crown in granting land to pueblos in New Mexico. Hordes Report at 5.[2/] In the formal Act of Possession in which Lieutenant General Bustamante measured out the grant, he stated that

> "the conceded leagues were measured for the formal pueblo," indicating that 5,000 varas were to be surveyed in each direction from the center of the settlement. He began to mark off the 5,000 varas that would have comprised the league measurement extending to the west, but after only 1,440 varas his path was impeded by the Río Grande. In order to compensate the pueblo for the shortfall of 3,650 varas, Bustamante decided to add lands to both the north and south boundary equally, so as not to cause prejudice to either one of the neighboring Spanish settlements of Bernalillo and Alameda.[3/]

Hordes Report at 6-7.

The lieutenant general also ordered that markers be placed "on the north, facing the point of the Cañada, commonly known as del Agua; and on the south, facing the mouth of the Cañada de Juan Tabovo; and on the east the Sierra Madre called Sandia. . . . ." *Id.* at 7. Dr. Hordes notes that "[t]he description of both the north and south boundaries in the original 1748 grant documents also indicated that the eastern boundary was located to the west of the Cañada del Agua and the Cañada de Juan Tabovo, geographical features located in the foothills of the Sandia Mountains. Therefore, according to the original 1748 granting documents, the eastern boundary of the pueblo was **not** the

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[2/]The Decree recites the governor's intention to "give commission as full and sufficient as is necessary in such cases to Lieutenant General Don Bernardo de Bustamante, so that . . . he pass to the place of Sandia and there conduct an inspection, calculation and recognizance of the said site, executing a distribution of lands, waters, pasture and watering places that correspond to a *formal Indian pueblo*, according to the prescription of the royal law." *Id.* at 5–6 (emphasis supplied).

[3/]The David V. Whiting translation of the 1748 Spanish grant documents, which Plaintiff refers to as the "official translation," Plaintiff's Reply to Defendants' Memorandum in Opposition... at 9 *passim*, likewise translates the words describing the measurement of the grant with "the leagues, granted to a formal pueblo, were measured...." Admin. Rec. #1804.

crest of the mountain, but, rather, a north-south line located to the west of the foothills of the Sierra Madre de Sandia." Hordes Affidavit at ¶ 8 (emphasis in original).[4/]

Possibly due to the weakness of its position under the the language of the 1748 grant, the Pueblo now relies heavily for support on the wording in the translation by David V. Whiting of the 1748 Spanish land grant ("Whiting translation") instead of on the grant document. *E.g.*, Plaintiff's Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and Plaintiff's Response to Defendants' Cross-Motion for Summary Judgment ("Plaintiff's Reply") at 10 ("...Whiting set the eastern boundary of the grant as the 'main ridge' of the Sandia Mountains").[5/] However, Dr. Hordes has established that the Whiting translation of the May 16, 1748 Act of Possession contains key errors, including using language that was not contained either in the original Spanish document, nor even in Whiting's own transcription into modern Spanish letters of the original archaic Spanish handwriting. Hordes Affidavit at ¶ 10.[6/] The Hordes Report discusses in detail the nature of inaccuracies in the Whiting translation. Hordes Report at 16–20. The effect of

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[4/]The Hordes Report notes that the instructions issued by Surveyor General Pelham to Surveyor Garretson pursuant to the 1858 act specifically instructed how to measure grants calling for measurement of a formal pueblo. Hordes Report at 24. The report also reviews in detail records of 19th Century litigation involving properties neighboring the pueblo. These proceedings clearly recognized the formal pueblo nature of the pueblo's boundaries. Hordes Report at 8–13. Dr. Hordes concludes that "[b]y the close of the Mexican period of New Mexico history, it is clear that almost all concerned parties -- Sandia Pueblo, their non-Indian neighbors, and Spanish and Mexican governmental officials -- defined the land rights of the pueblo in terms of a 4-square-league area, as shaped by the 1748 land grant and Act of Possession." *Id.* at 13–14 (footnote omitted). The one-league length of the eastern boundary of the pueblo in the center of the settlement "would place the eastern boundary within the river valley, well short of the foothills of the Sandia Mountains." *Id.* at 14.

[5/]As a matter of fact, Whiting merely *translated* the grant as setting the eastern boundary at the "main ridge" of the Sandia Mountains. As a related matter, the Pueblo had earlier asserted that the error in the survey was in fact the result of its having followed "a flawed ('Whiting') translation of a spurious grant document....The genuine grant document was available ... but apparently was ignored." Letter of P. Grossi to F. Ryan (Mar. 14, 1986), Admin. Rec. #188.

[6/]In contrast to Whiting's *translation*, Whiting's *transcription* of the archaic Spanish handwriting of the grant was very faithful to the text. Hordes Report at 16.

the mistranslation was to add over 7,000 acres to the Pueblo's lands in excess of the amount comprising a formal pueblo. Hordes Affidavit at ¶ 10.[7/]

Further, with regard to Plaintiff's claim that the wording of the 1748 grant document, "on the east, the Sierra Madre called Sandia," places the eastern boundary at the crest of the Sandia Mountains, *e.g.*, Plaintiff's Reply at 9, Dr. Hordes explains that the reference to Sierra Madre de Sandia is merely a directional indication: the authorities laid out the boundaries of the pueblo as much as possible according to those of a "pueblo formal," with the eastern boundary extending one league from the center of the pueblo, reaching just about to the foothills. "As an additional general reference point, the Spanish royal official who established the boundaries pointed to the mountain range of the 'Sierra Madre de Sandia' as lying to the east. Thus, the designation of the eastern boundary of the pueblo as a point extending one league towards the foothills is fully consistent with a broad, general designation of the eastern boundary as the ***Sierra Madre***." Hordes Affidavit at ¶ 10 (emphasis original).[8/]

[7/]Meanwhile, the issue of inaccuracies in the Whiting translation and in the underlying documents had previously been raised with Solicitor Tarr. *E.g.*, Tarr Opinion at 2-3 n.2, Admin. Rec. #1660-61; Letter of P. Grossi to F. Ryan (Mar. 14, 1986) (referring to "a flawed ('Whiting') translation of a spurious grant document"), Admin. Rec. #188.

[8/]In the words of Solicitor Tarr,

> Rather than reading as a whole the Act of Possession laying out the Pueblo, the Pueblo focuses entirely on the third sentence of the quoted paragraph of the Act of Possession. ... The third sentence memorializes Bustamante's direction to place markers of mud and stone the height of a man to perpetuate the memories and designations as he had already laid them out on the ground. Bustamante ordered that these markers be placed "on the north facing the point of the canada which is commonly called'del Agua,' and on the south facing the mouth of the Canada de Juan Tabovo, and on the east the sierra made called Sandia....
>
> [T]he issue in this matter is not over the meaning of the phrase "the sierra madre called Sandia," that is, whether the Spanish term translated "main ridge" by Whiting refers to the foothill or the crest of the mountains. Rather, the issue is whether the reference to the mountains is a call to a natural feature as a boundary or is a directional reference to a natural feature facing which the monument was to be placed.

(continued...)

Clearly, the 1748 Spanish land grant intended to convey and explicitly conveyed a formal Pueblo, contrary to Plaintiff's contentions. This conclusion of the Hordes Report confirms the earlier conclusion by Solicitor Tarr.[9]

3. "*Sierra Madre*" Refers to a Mountain Range, Not a Main Ridge

Further, the Hordes Affidavit refutes the contention in an affidavit of Plaintiff's expert that "Sierra Madre de Sandia" can be translated to mean the main ridge of Sandia Peak.

> An examination of Spanish language and etymological dictionaries from the eighteenth to the twentieth centuries shows a strong consensus among authorities that ***sierra*** referred to a mountain ***range***, not the highest point of the mountain range. Neither did the primary archival documentation from the eighteenth and early nineteenth centuries present the terms ***sierra*** or ***Sierra Madre*** in any other than a general locational context. Nowhere in the contemporary documentation could citation be found to the ***Sierra Madre*** or ***Sierra de Sandia*** as the crest of the mountain or the "main ridge."

Hordes Affidavit at ¶ 9 (emphasis in original). The Hordes Report discusses in detail the proper translation of the term "Sierra Madre" as referring to a mountain range. *Id.* at 27–36.[10]

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[9](...continued)
Tarr Opinion at 20 (Admin Rec. #1678).

[9] *E.g.*, Tarr Opinion at 19 ("These [spanish grant]documents, therefore, leave little doubt that the Spanish intended to grant a formal pueblo of as close to four square leagues as possible to the Sandia Pueblo"), Admin. Rec. #1677.

[10] Dr. Hordes has also rebutted Plaintiff's claim that the treatment of the eastern boundary of the neighboring Elena Gallegos land grant supported Plaintiff's claim. *E.g.*, Plaintiff's Summary Judgment memorandum at 18. Dr. Hordes notes, however, that

> the Sandía Grant and the Elena Gallegos Grant differ in two fundamental respects. First, the language of the grants are significantly different with respect to the specificity of the boundary calls. Second, the nature of the pueblo grant was distinct from grants to non-Indians [with the Gallegos Grant specifying the boundary as the "*Sierra de Sandia*"]. Sandía represented a formal pueblo grant, which adhered to the limitation of a four-square-league area, as opposed to Elena Gallegos, which had no such express limitation.

Hordes Report at 32. *See generally* discussion in Hordes Report at 32-36.

In sum, the 1748 Spanish land grant to the Pueblo provides no support for Plaintiff's claim to the Claim Area. Archival, historical and etymological research establish that the pueblo in fact received more land pursuant to the 1858 statute and consequent survey than was intended by the 1748 grant. Accordingly, the resurvey sought by Plaintiff —of the eastern boundary of the grant— would be a hollow exercise. If resurveyed today, the survey would necessarily consider an accurate translation of the 1748 land grant confirmed by the 1859 statute and would not rely on the Whiting translation in light of its clear inaccuracies. The resulting resurvey would not support the Pueblo's entitlement to the Claim Area and would merely confirm that the Pueblo already has more property than it was entitled to.

B. The Private Property and Local Governmental Interests Threatened by the Pueblo's Claim Distinguish this Case from *Pueblo of Taos*

Plaintiff relies heavily on the decision in *Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979), as purported support for Plaintiff's contentions in this case.[11/] That case is, however, readily distinguishable *inter alia* on grounds that the Court, in mandating application of an existing new survey to land that had been acquired in trust for the Pueblo of Taos, relied on the lack of an impact of such action on private properties.

The Court in *Pueblo of Taos* held that cases holding that surveys are conclusive upon the United States and on patentees in the interest of quieting title did not apply in the case before it, in

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[11/] Indeed, in contrast to its effort since the time of its amendment of the instant Complaint to model the relief it seeks on that at issue in *Pueblo of Taos* (*i.e.*, imposition of a trust on federal land in the Pueblo's favor), the Pueblo formerly and in its original Complaint, sought more. Thus, in 1986, the Pueblo approached the Department of the Interior to "regain undisputed title to" the Claim Area. (Letter of P. Grossi to F. Ryan (DOI) (Mar. 14, 1986) (Admin Rec. #186-193, at 187). To the same effect, in its original Complaint, it sought as relief a resurvey and title to the Claim Area. If not wholly abandoned by amendment of its Complaint to better fit within the parameters of the *Pueblo of Taos* decision, such claim would be subject to the Quiet Title Act as was possibly recognized by Associate Solicitor Vollman. *See* Admin. Rec. # 755 (Vollman memorandum "does not address whether the Pueblo could prevail in a lawsuit, given applicable statutes of limitations").

which private parties had not relied on challenged measurements or where adjusting challenged boundaries would be inequitable in light of such reliance. 475 F. Supp. at 367. It noted that in the case before it, "[n]o private parties [had] ever relied on the erroneous boundary." *Id.*

In the present case, by contrast, any granting of the relief sought by Plaintiff would directly impact the private inholdings within the Claim Area.[12/] This fact raises significant equities not addressed by the Court in *Pueblo of Taos*. For example, *Foust v. Lujan*, 942 F.2d 712 (10th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992), concerned an appeal of an Interior Department denial of an application to correct error in a patent, where the correction would affect Indian land. The court rejected the agency's contention that its fiduciary duty to the Indians precluded the relief, pointing out the countervailing private interest at issue: "[t]he fact that the Secretary is vested with responsibilities both to correct patent errors and to act as trustee for the Indians cannot operate against patentees who have Indians, rather than non-Indians, as neighbors." *Id.* at 715. To similar effect, the strong policy of repose underlying the Quiet Title Act also informs the case law on the conclusiveness of patents and underlying surveys. Thus, in *De Guyer v. Banning*, 167 U.S. 723, 743 (1897), the Court held that

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[12/] For this reason, the Pueblo has repeatedly stated that it has no interest in the private holdings within the Claim Area. *E.g.*, Plaintiff's Reply at 2, n.1. However, Plaintiff's proffered waiver is ineffective without more. The Nonintercourse Act provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title *or claim thereto*, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (emphasis supplied). Further, the Pueblo Lands Act includes a section dealing with conveyances of Pueblo title, providing that "no sale, grant, lease of any character, or other conveyance of lands, or any title *or claim thereto*, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior. 43 Stat. 641-642 (emphasis added). As a related matter, Congress has delegated to the Secretary of the Interior authority to approve certain transactions involving Indian land. *E.g.*, 25 U.S.C. §§312, 379. Absent such approval by the Secretary, real live private interests remain threatened by the Pueblo's claims in this action.

> the patent having been accepted by the patentees, and being uncanceled, the plaintiffs in this action, claiming under the patentees, cannot recov er lands not embraced by it, even if such lands are embraced by the lines established by the decree of confirmation, the conclusive presumption being that the patent correctly locates the lands covered by the confirmed grant.

See also United States v. Chandler-Dunbar Water Power Co., 209 U.S. 1908 (1908) (under 43 U.S.C. §1166, United States could not sue to vacate or annul patents more than six years after issuance).[13/] In short, it is established that private parties should be entitled to rely on applicable patents and surveys, notably ones issued more than 130 years previously,[14/] and this consideration is the basis of a significant distinction between this case and *Pueblo of Taos.*

The Pueblo's statement that it has no interest in the private holdings within the Claim Area, *e.g.*, Plaintiff's Reply at 2 n.1, might be viewed as addressing the important distinction that the presence of private parties creates between this case and *Pueblo of Taos.* However, as noted above, Plaintiff's proffered waiver of claims is ineffective without more; the Pueblo cannot alienate property or a claim to property without approval by the Secretary of Interior.[15/] Absent such approval by the Secretary, real live private interests remain threatened by the Pueblo's claims in this action. Further, the proferred waiver wholly fails to address the many vital interests of Bernalillo County in the Claim Area (beyond the important property interests of its citizens) which are threatened by Plaintiff's claims herein. As set out in greater detail in the Memorandum of Points and Authorities in Support of Bernalillo County's Motion to Intervene as Defendant (June 29, 1995),

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[13/] *But see Cramer v. United States*, 261 U.S. 219 (1923) (suits for the benefit of Indians may be allowed in some cases).

[14/] *Compare* Tarr Opinion at 26 (admin. Rec. #1684) ("the failure to challenge the patent until 1983, some 120 years after its issuance, is the most troubling circumstantial evidence involving this claim. The Pueblo apparently asserted no claim to the 10,000 disputed acres prior to 1983. As a consequence, the Pueblo's eastern boundary remained essentially unquestioned for over 120 years...").

[15/] *See* discussion in footnote 12, *supra.*

the Claim Area comprises open spaces, including a network of recreational trails, that constitute an important component of the County's established open space management plan. The County also exercises police powers relating to water, waste, pollution, and animal and pest control in the interests of public health and safety on private lands within the Claim Area. These interests, including notably the police powers, could be seriously impacted by a grant of Plaintiff's requested relief, *see id.* at 2-3, 12-14, and they bear consideration in this case. *E.g.*, 43 U.S.C. §772 (no resurvey of public lands "shall be so executed as to impair the bona fide rights or claims of any claimant"); *Metropolitan Water Dist. of S. California v. United States*, 628 F.Supp. 1018, 1021 (S.D. Cal. 1986) (words "'any claimant', indicate that Congress intended to protect the entire spectrum of rights of claimants that might be affected by a land resurvey"), *remanded on other grounds*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub nom. California v. United States*, 109 S.Ct. 2273 (1989). These kinds of interests, further distinguish the *Pueblo of Taos* decision, which considered no interests of this kind.

C. The Pueblo's Delay in Challenging the Survey Militates Against a Grant of Summary Judgment

Even if an error in a patent (or the incorporated survey) were established, "the other circumstances of the case must be examined to determine whether considerations of equity and justice warrant amendment of the patent. *Foust v. Lujan*, 942 F.2d at 717. In that case, in which a tribe objected to the correction of a patent, the court specifically cited the Indians' failure to object earlier as barring their current arguments:

> ...[t]he Indians took no action with respect to the land until the early 1980s, some fifty years after the remaining undisposed land in the area was conveyed to them. Although adverse possession does not run against the Indians, their failure to take some action against the alleged trespass for nearly forty years is a relevant consideration in evaluating the equities of the case....[I]f they did know of the

> mistake but did nothing about it, ... they cannot assert now that the land is so valuable that an exchange would prejudice their interests.

In the present case, the record establishes that the Pueblo has been on notice of the boundary of their land grant since at least 1864, when the patent issued. The Pueblo waited 120 years to raise this issue, notwithstanding numerous statutorily-afforded opportunities to obtain judicial review of their claims. The Pueblo has previously also actively pursued litigation concerning other matters affecting its boundaries. *See* Tarr Opinion at 8, Admin. Rec. #1666. The Claim Area was also resurveyed in 1915, resulting in ratification of the Clements survey, with no objection from the Pueblo. *Id.* (citing *United States v. Abouselman*, No. 1839 (D.N.M. Dec. 16, 1929)). In addition, the Pueblo dealt in detail and over many years with the Forest Service without objection. Moreover, on information and belief, it did not object to the 1978 designation under the Endangered American Wilderness Act, 16 U.S.C. §1132, designating some 8900 acres of the roughly 10,000 acre Claim Area as the Sandia Mountain Wilderness under the administration of the Secretary of Agriculture. Finally, on information and belief, it did not object to subdivision of the Claim Area for construction of the Sandia Heights North subdivision and other later residential subdivisions, and it even entered into lease agreements to provide for access over reservation land to the Sandia Heights North and other subdivisions located in the Claim Area.

Just as the court actually did in *Foust,* Solicitor Tarr was fully justified in considering this signal default of Plaintiff among the equities affecting its claims.[16]

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[16] As noted by Solicitor Tarr, "As a consequence, the eastern boundary remained essentially unquestioned for over 120 years, with the federal, state and local governments, as well as private citizens, treating the boundary as drawn in the Clements survey as entrely accurate." Tarr Opinion at 26, Admin. Rec. #1684.

D. CONCLUSION

For all the foregoing reasons, summary judgment should be denied to Plaintiff Pueblo of Sandia on grounds, as urged also by Federal Defendants, that the decision of Secretary Hodel challenged herein, as well as the underlying opinion of Solicitor Tarr, was not arbitrary and capricious nor otherwise not in accord with law and and that Secretary Babbit's inaction on the Pueblo's claim does not constitute reviewable final agency action and/or was not arbitrary and capricious; the foregoing is merely confirmatory of the conclusions of Solicitor Tarr. To the extent the Court considers extra-record material relied on by Plaintiff in this proceeding, Intervenor Defendant respectfully submits the foregoing extra-record materials in opposition to Plaintiff's Motion for Summary Judgment and in support of a grant of Summary Judgment to Bernalillo County.

Respectfully submitted,

Dated: September 16, 1997

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